



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBSA

ELC NO. 423 OF 2017

JOSEPH KAMAU MBIRIRI..... PLAINTIFF

VERSUS

1. ROBERT KIWUWA KIGO

2. AGNES NDUNGE KIWUWA & ASSOICATES

3. GUSHUMBU D.A. RANGACO LTD..... DEFENDANTS

RULING/DIRECTION

I. PRELIMINARIES.

1. On 29th November, 2021 when the matter was slated for hearing of a Notice of Motion application dated 3rd November, 2021 by the 3rd Defendant, this court's attention was drawn by both the Learned Counsels Mr. Gaita for the Plaintiff and Mr. Amadi for the 1st and 2nd Defendants, to its orders/directions made on 21st January, 2020. The said orders were to the effect that ***“the status quo to be maintained”*** whereby the Notice of Motion dated 3rd November, 2021 was compromised in order to pave way for the main hearing of the case.

Indeed, on 15th February, 2021 the hearing of the main case commenced in earnest. So far two Plaintiff's witnesses being PW - 1 and PW - 2 respectively have testified.

II. The Submissions by the Defendant.

It was until the 29th November, 2017 whereupon Mr. Amadi Advocate reminded court that despite of the aforementioned direction made by this Court on 21st January, 2020 for the status quo to be maintained, there seem to be a misinterpretation on it as the Respondents were moving at a very high speed in extracting and exploring the mining mineral deposits at the suit land at the expense of the Defendants herein. He averred that this was happening notwithstanding the fact that the suit was still proceeding on a situation which has been prejudicing the Defendants herein and putting them at a disadvantaged position while the Plaintiffs continued enjoying the benefits and proceeds of the mining.

2. The Learned Counsel held that the situation on the ground was very volatile. Thus, there was great need for the court to make some intervention in order to calm things down. Specifically, the Learned Counsel for the Defendants urged court to provide them with specific and tangible direction on the meaning nature, and scope of the status quo to be maintained.

III. The Submissions by the Plaintiff

3. On the other hand, Mr. Gaita the Learned Counsel for the Plaintiff held that their client had been mining on the suit land since the year 1987. He opined that his client had several mines spread out at the Counties of Taita Taveta and Kwale respectively. He informed court that his client was a licensed miner from the year 1978 to date. Currently, he was mining at a place called Kisangu (christened it as “Riziki”) Sub - Location Voi Sub-County Taita Taveta District.

With regard to the status quo being maintained, Mr. Gaita strongly relied on the Provisions of Section 37 of the Mining Act which in essence granted the Plaintiff the right over the mining activities until the pending instant case before court was heard and determined. Its based on this dispute and upon the parties failing to mutually arriving at an agreement on the meaning of the status quo that they turned to court as an arbiter to provide them with direction thereof.

IV. ANALYSIS AND DETERMINATION

4. This Honorable Court being an arbiter was called upon to provide the following:-

(a) What is the interpretation – nature, meaning and scope of the status quo to be maintained order by this court on 20th January, 2020 and

(b) How should this matter proceed on further henceforth.

ISSUE No. (a) - What is the interpretation – nature, meaning and scope of the status quo to be maintained order by this court on 20th January, 2020.

According to the Black Law Dictionary “*Status Quo*” means “*The situation in which/that currently exists – (That existed before something else (being discussed occurred)*” While “*To Maintain*” means “*To continue (Something)*” or to continue in possession of property e.t.c.

A. The Plaintiff’s Case

5. In order to make progress, it imperative that we all appreciate the matter from both the view point by the Plaintiff and the Defendants herein.

Based on the facts contained in the pleadings, the Plaintiff Mr. Joseph Kamau Mbiriri held that he was a male adult of sound mind and understanding. He was a licensed miner registered under the Ministry of Mining. He is currently undertaking mining of Spinel minerals at a place called Riziki Mining Location situated at Pamleso, Kasigei Location Voi Sub - county in the County of Taita Taveta. He displayed his single business permit for the year 2017 and a general map for the location.

He asserted that he moved to the location for mining purposes from the year 1978 after seeking consent from the local community. He complied with all the relevant government and departmental requirements and was issued with a Mining Registration Certificate for eight (8) mining locations duly registered as Numbers 1389 to 1396 all inclusive. As already indicated above, he christened the Location “Riziki”.

6. According to him, sometimes in the year 2007 the registration location underwent changes and new numbers namely 1970 to 1977 were issued. He stated that due to the high potential insecurity within the place, he had never resided there but had always maintained his workers on site. He had invested heavily in exploration, actual mining and research leading to intervention recognitions wherein the deposit had been cited as Third known deposit in with the continent of Africa closely after Tanzania and Madagascar in ranking and that order.

7. Sometimes in the year 2017, he averred that the Defendants illegally and wrongfully got into his mining location and took possession. As a result, a dispute between them ensued. The Defendants claimed to have been given a consent by the 3rd Defendant, allegedly as the legal owners of the mine sites to mine from there. The disagreement escalated and eventually was taken before the District and Regional Geologist to resolve it. The Plaintiff holds that it was eventually determined to his favour.

Nonetheless, despite of the successful decision, they were urged to enter into an agreement - the 1st Defendant and the Plaintiff whereupon the 1st Defendant was offered some benefits and advised to withdraw from the area. The Plaintiff states that still the 1st Defendant declined. Instead they forcefully entered into the location. As a result, this altercation between the Plaintiff and 1st Defendant has been going on for a while. On 2nd November, 2017 the Plaintiff received a letter copied to him by the officials of the 3rd Defendant instructing the Director of Mines to cancel and remove all information entered into the Cadastral Portal in favour of the Plaintiff on allegation that he lacked their consent to mine in the area.

8. Thereafter, on 7th November 2017 the Plaintiff received a letter from the Director of Mines asking him to respond to the above letter by the 3rd Defendant’s Officials. Vide a letter dated 14th November, 2017, the Plaintiff obliged.

On 20th November, 2017, based on all the surrounding facts, the Plaintiff decided to institute this suit seeking a relief in form of permanent injunction restraining the Defendants from entering trespassing upon carrying out mining and/or mineral exploration with the Plaintiff’s allocated location identified as “Riziki” a declaration that the Defendants were not seized of requisite authority to apply for grant and/or confer mining rights on the location identified as “Riziki” and costs.

B. The Defendant’s Case

9. On the other hand the 1st and 2nd Defendants claim to have received a consent on 4th May, 2015 to mine on the suit location from the 3rd Defendant the legal and absolute registered owners of the mines. They had been prospecting and mining in the location from the year 2011. They claim to have cleared the bush and established a camp for the workers and continued with the mining for 6 years without any interruption by anybody including the Plaintiff.

10. According to them, as they continued with the prospecting of minerals it became important that they formalized their relationship with the 3rd Defendant. Thus, on 21st August, 2017 they entered into a formal and duly executed agreement upon making payment for a sum of Kenya Shillings Seventy Five Thousand (Kshs. 75,000/=) to the 3rd Defendant as mining fees. The 1st and 2nd Defendant stated that they

would be making the payment fees for prospecting rights of minerals to the County Council of Taita Taveta and then later on with the promulgation of the Constitution of Kenya to the County Government of Taita Taveta. They had a well recognized and well established business having been in compliance with the land. This required them to put information in the Kenya mining Cadastral Portal Home – Map bearing co - ordinates 3.57 33.8 and 38.45.25 East.

11. In the course of time, in September, 2017 that the Plaintiff appeared from nowhere having heard of the mining prosperity and progress achieved by the 1st and 2nd Defendants, claiming that the mining holes they had been working on for 6 years having invested heavily and they were forcibly chased and the mining sites taken up by the Plaintiff. They lodged a complainant with the Voi Police and the Plaintiff was arrested for trespass and destruction of property. He was later released and never charged. The 1st and 2nd Defendants alleged that the Plaintiff who could not explain where he had been all these years since 2011 seem to have a well - choreographed scheme with the support of Mr. Omito of Mines and Geology Taita Taveta to drive them away from the mines sites so as to easily and without expense enable the Plaintiff commence harvesting mineral discovered by the Defendants after sacrificing almost all the entire life savings.

They claimed that the Plaintiff had no valid and operational licence as to warrant the claim and/or support from mines and Geology Department and the only valid document he had namely Annual Business Licence from Taita Taveta County was obtained in November, 2017 only for purposes of this case.

During the pendency of the hearing of this case on 3rd November, 2021, the Defendant filed an application seeking injunction orders to stop the Plaintiff from further mining or carrying out any related activities on the mines sites pending the hearing and the finalization of the hearing of this case.

II. The Legal interpretation per excellence.

(a) From the court records, it appears that on 20th November, 2017 this Honorable Court pursuant to a Notice of Motion application dated 17th November, 2017 under the provisions of Order 40 Rules 1, 2, and 4, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 13 (17) of ELC Act, of 2012 and Sections 3 and 3A of Civil Procedure Act, Cap. 21, it granted the Plaintiff temporary injunction orders restraining the Defendants by themselves and their agents from entering, invading, trespassing and/or interfering with the Plaintiff's mining activities on the mining location identified as "Riziki" location pending the hearing and determination of the application.

(b) Eventually, on 19th September, 2019, by consent of the parties, it was agreed that the two Notice of Motion applications of 17th November, 2017 and 7th December, 2017 respectively be compromised to pave way for the full trial which had since begun in earnest. Unfortunately, the interim orders which are temporary in nature, would never be never be extended. From the records it is not clear what came of the injunction orders whether it was extended until the full trial was heard and determined. Perhaps that state of affairs is what was replaced by the orders of the status quo to be maintained.

(c) Without getting into the details of the case as guided by the principles of "*Sub Judice*" and not to prejudice the rights of the parties herein, I wish to indulge slightly on the legal substratum on the law of Minerals and Mineral Oils. The Minerals and Mineral Oils as defined by Law constitute public Land under the provision of the Article 62 of Constitution of Kenya. The legal framework governing the mining sector includes the Gold Mines Development Loans Act, the Continental Shelf Act and the Mining Act 2016 which governs the prospecting for and mining of minerals and gives effect to the provisions of Articles 60 to 62 (1) (f), 66 (2), 69 and 71 of Constitution of Kenya.

Prior to the grant of a mineral right, the Licensing and permit regime requires an application be made to seek approval from National land Commission in the case of Public Land or the relevant state authority where the mineral rights is on public land.

In the case of private land mineral rights may only be granted with the consent of the registered proprietor under the provision of Section 37 of the Mining Act.

With respect to community land, the consent for mining rights it made to the appropriate authority. The obligation by law in relation to the administration of community land is required whereas in the case of unregistered community land the National Land Commission may give the requisite consent section 38 of the Mining Act No. 12 of 2016.

Under Part I – Preliminary Provisions ***Mineral Rights*** are defined as:-

(a) A prospecting Licence,

(b) A retention Licence

(c) A Mining Licence

(d) A Prospecting Permit

(e) A mining Permit and

(f) An artisanal Permit

Under Part VI General Provision on Mineral rights, defines “*Consents*” as stated under the provision of Section 37(1) Mineral rights on private land (Refer above). The provision of *Section 37(3) of the Act is where consent is granted prior to any change in land ownership such consent shall continue to be valid for as long as the prospecting and mining rights subsists.*

V. THE DETERMINATION/DIRECTION:-

13. In the long run, arising from above detailed and elaborate analysis of this matter, I do hereby render directions as follows being the nature, meaning and scope of the status quo to be maintained, *inter alia*:-

(a) **THAT** although the temporary injunctions orders granted on 17th November, 2020 pursuant to the provisions of Order 40 Rules 1, 2 and 3 of Civil Procedure Rules 2020, were compromised on 19th September, 2017 were not extended inadvertently, but acting in good faith by the parties in order to pave way for the full trial, this court invokes its inherent – (the oxygen rule & overriding principles) vested on it under the provision of Section 3(1) of the Environment & Land Court Act of 2019, Section 101 of the Land Registration Act, No. 3 of 2012, Section 150 of the Land Act, No. 6 of 2012 and Article 159 (1) and (2) of the Constitution of Kenya to extend the said orders until the matter is heard and finally determined.

(b) **THAT** the Provisions of Section 37 (1) and (3) of the Mining Act No.12 of 2016 to take effect allowing the Plaintiff to continue mining until the matter is heard and determined.

(c) **THAT** for expediency sake and natural justice, equity and conscience this matter be granted first priority and fast track to have been finalized in the **NEXT NINETY (90) DAYS** from the date of this orders.

(d) **THAT** each party to bear its own costs.

IT IS SO ORDERED ACCORDINGLY

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY 2022

JUSTICE HON. L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT,

MOMBASA

In the Presence of:

a) M/s Yumna, Court Assistant.

b) Mr. Gaita Advocate for the Plaintiff.

c) Mr. Amadi Advocate for the Defendant.